

15th 12948
mJ

Office of County Attorney

STARR COUNTY



ROMERO MOLINA
COUNTY ATTORNEY

MARTHA CANTU
SECRETARY

ROSENDO A. RAMIREZ
INVESTIGATOR

P. O. BOX 1198

RIO GRANDE CITY, TEXAS 78582

PHONE NUMBER
(512) 487-4707
(512) 487-5287

July 10, 1991

RQ III

RECEIVED

JUL 12 91

Opinion Committee

Dan Morales
Attorney General
Office of Attorney General
P. O. Box 12548
Austin, Texas 78711-2548

RE: Request for Attorney General Opinion

Dear Mr. Morales:

In my official capacity as County Attorney in and for Starr County, Texas, I hereby request an Attorney General Opinion concerning the matter which is covered by the attached brief.

If you have any questions feel free to call.

Very truly yours,

Romero Molina

RM/mc

ACCOMPANIED BY ENCLOSURES —
FILED SEPARATELY

Hon. Dan Morales
Attorney General of Texas
Legal Opinion Division
P. O. Box 12548
Austin, Texas 78711-2548

BRIEF IN SUPPORT OF REQUEST
FOR ATTORNEY GENERALS OPINION

ISSUE

Whether a legal service fee contract between a School Board of Trustees and a private attorney who is a second cousin to one of the members of the School Board is governed by the Nepotism Statute, article 5996a, V. T. C. S. or by the Conflict of Interest Statute, chapter 171, Local Government Code, V. T. C. S..

APPLICABLE STATUTES
CITED HEREIN

The Nepotism Statute, article 5996a, V. T. C. S. ;
The Conflict of Interest Statute, Chapter 171, Local Government Code, V. T. C. S. ;
Texas Open Meetings Act, article 6252-17, V. T. C. S. and
Texas Tax Code, section 6.03 (a), V. T. C. S..

FACT STATEMENT

In February, 1991, School District, by and through its duly elected School Board Trustees, awarded a legal service fee contract to an attorney engaged in private practice. One of the Board members and the attorney to whom said contract was awarded are second cousins, i. e. the Board member's grandfather and the attorney's grandmother were brother and sister. In keeping with the Texas Open Meetings Act, article 6252-17, V. T. C. S., the discussion and awarding of said contract was done in open session during a meeting of the School Board.

Pursuant to said contract, whenever the school district needs advice, council, a legal opinion or representation, the legal issue is referred to the attorney and the attorney does whatever in the discretion of said attorney is necessary to resolve the legal issue presented. The attorney is not con-

trolled by the school district nor is the attorney directed in how to accomplish her objective. Further, the contract provides that the attorney may seek and retain associate council whenever it is deemed necessary by said attorney, at her discretion.

APPLICATION OF LAW

The Nepotism Statute, article 5995a, V. T. C. S., hereinafter referred to as the Nepotism Statute, provides in relevant part as follows:

" No officer of this State nor any officer of any district, county, city, precinct, school district, or other municipal subdivision of this State, not county, city, school district or other municipal board, or judge of any court,..... shall appoint, or vote for, or confirm the appointment to any office, position, clerkship, employment or duty, of any person related within the second degree by affinity or within the third degree by consanguinity to the person so appointing or so voting, or to any other member of any such board,....." (Emphasis added).

Thus, the question arises whether the legal service fee contract constitutes an " office, position, clerkship, employment or duty" within the meaning of the Nepotism statute.

In order to determine whether said contract constitutes employment within the meaning of the Nepotism Statute, one must consider other statutes and court decisions and Attorney General opinions. Very little case law exists which interprets the Nepotism Statute. One case which is frequently cited with regard to the Nepotism statute is BEAN VS STATE, 691 S. W. 2d 773 (Tex. App. 8th Dist., 1985). In Bean a District Judge who appointed an attorney, who was related to him within the prohibited degree, to represent an indigent defendant was found to be in violation of the Nepotism Statute. However, Bean is distinguishable from the case at bar in that Bean involved an " appointment" and the instant case involves a contract for professional services. Thus, it is my opinion that Bean does not apply to the instant case.

In considering other statutes, Attorney General Opinion No. MW-129 in considering the Texas Open Meetings Act, article 6252-17 V.T.C.S. concluded that a Commissioners Court could not meet in executive session to discuss employment of an " engineering, architectural, or consulting firm whose professional services were to be provided by specific written contract" for the reason that same were classified as " independent contractors and "not officer or employee" within the meaning of the statute. Said opinion cites with approval an Oklahoma Attorney General Opinion No 75-702, which concluded that architects, lawyers and physicians were independent contractors. The rationale for said clas-

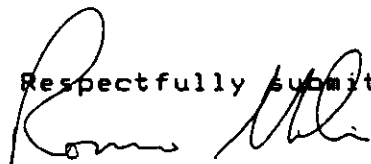
sification being that they would undertake to do a specific piece of work for the county using their own means and methods without submitting themselves to the control of the county in respect to all the details of the work. In the case at bar the school district was required by the Texas Open Meetings Act to discuss and award the contract in question in open session because said attorney is considered an independent contractor. Thus, it would be inconsistent and place the school district in a precarious position, to classify the same attorney pursuant to the same contract as an independent contract with respect to the Texas Open Meetings Act and as an employee with respect to the Nepotism Statute, both of which the school board must comply with.

In Attorney General Opinion No. JM-1060, it was concluded that "an attorney who has a contract with a taxing unit to collect its delinquent taxes is not an 'employee' under section 6.03 (a), Tax Code and is not ineligible under that provision to be a director of the appraisal district which included that taxing unit". Thus, it appears that the relationship between the school district and the attorney is determined by the existence of a contract for the professional services to be provided by said contractor and the degree of control exercised by the governmental body over said individual in the performance of said services. Thus, I consider that the attorney in the question is an independent contractor and not an employee and thus not subject to the Nepotism Statutes.

Attorney General Opinion No. JM-492 concluded that the Conflict of Interest Statute, article 988b, V. T.C.S., Local Government Code, chapter 171, V. T.C. S., and not the Nepotism Statute controls the letting of contracts to relatives by local public officials. Said statute prohibits the awarding of a contract to a person who is related to the public official in the first degree by affinity or consanguinity. Since, the Board member and the attorney are not related within the prohibited degree, the contractual relationship between the school district and the attorney is not in violation of the Conflict of Interest Statute.

In conclusion, I find that legal service fee contract between the school district and the attorney is not in violation of the Nepotism or Conflict of Interest Statutes of the State of Texas.

Respectfully submitted,



Romero Molina
County Attorney
Starr County, Texas